90-178

Supreme Court, U.S.
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JUL 21 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO. 90-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

GEORGE J. AUBIN, CAMERON ENGELKE AUBIN, A.C.T. PROPERTIES, INC., SIGMA CAPITAL CORPORATION, SIGMA REALTY CORPORATION, WICHITA LAND & CATTLE COMPANY, WICHITA EQUINE, INC., WICHITA CORPORATION, KAPPA DEVELOPMENT COMPANY, NFU INVESTMENT COMPANY, NFU FINANCIAL COMPANY, COLWELL HOLDING CORPORATION, R.B.I. REALTY, THE CLW CO., J.B. HARALSON and I.B.R., INC.,
Petitioners

v.

E. F. HUTTON GROUP, INC. and E. F. HUTTON AND COMPANY, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Did the Court of Appeals abuse its discretion by dismissing this case for want of prosecution for failure to timely file a brief where the brief was filed a mere 33 days after the original deadline and within an extension granted by the Clerk of the Court of Appeals?

LIST OF ALL PARTIES

PETITIONERS:

GEORGE J. AUBIN, CAMERON ENGELKE AUBIN, A.C.T. PROPERTIES, INC., SIGMA CAPITAL CORPORATION, SIGMA REALTY CORPORATION, WICHITA LAND & CATTLE COMPANY, WICHITA EQUINE, INC., WICHITA CORPORATION, KAPPA DEVELOPMENT COMPANY, NFU INVESTMENT COMPANY, NFU FINANCIAL COMPANY, COLWELL HOLDING CORPORATION, R.B.I. REALTY, R.B.I., INC., THE CLW CO., J.B. HARALSON, and I.B.R., INC.

RESPONDENTS:

E. F. HUTTON GROUP, INC. and E. F. HUTTON AND COMPANY, INC.

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v.

E. F. HUTTON GROUP, INC. and E. F. HUTTON AND COMPANY, INC.,
Respondents

PETITION FOR WRIT OF CERTIORARI

To The Honorable Supreme Court:

REPORTS OF OPINIONS BELOW

The opinions of the courts below are unpublished, but are reproduced in the appendices.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was rendered March 28, 1990. Petitioners' Motion for Rehearing was overruled April 23, 1990. The Court has jurisdiction under 28 U.S.C. § 1254.

STATUTES AND RULES INVOLVED

Federal Rule of Appellate Procedure 3(a) provides:

> Filing the Notice of Appeal. An appeal permitted by law as of right from a district court to a court of appeals shall be taken by filing a notice of appeal with the clerk of the district court within the time allowed by Rule 4. Failure of an appellant to take any step other than the timely filing of a notice of appeal does not affect the validity of the appeal, but is ground only for such action as the court of appeals deems appropriate, which may include dismissal of the appeal. Appeals by permission under 28 U.S.C. § 1292(b) and appeals by allowance in bankruptcy shall be taken in the manner prescribed by Rule 5 and Rule 6, respectively.

Federal Rule of Appellate Procedure 26(b) provides:

> Enlargement of Time. The court for good cause shown may upon motion enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance, or a petition for permission to appeal. Nor may the court enlarge the time prescribed by law for filing a petition to enjoin, set aside, suspend, modify, enforce or otherwise review, or a notice of appeal from, an order of an administrative agency, board, commission or officer of the United States, except as specifically authorized by law.

Federal Rule of Appellate Procedure 27(b) provides:

> Determination of Motions for Procedural Orders. Notwithstanding the provisions of (a) of this Rule 27 as to motions generally, motions for procedural

> orders, including any motion under Rule 26(b), may be acted upon at any time, without awaiting a response thereto, and pursuant to rule or order of the court, motions for specified types of procedural orders may be disposed of by the clerk. Any party adversely affected by such action may by application to the court request consideration, vacation or modification of such action.

Federal Rule of Appellate Procedure 31(c) provides:

> Consequence of Failure to File Briefs. If an appellant fails to file a brief within the time provided by this rule, or within the time as extended, an appellee may move for dismissal of the appeal. If an appellee fails to file a brief, the appellee will not be heard at oral argument except by permission of the Court.

Fifth Circuit Local Rules 27.1 and 27.1.1 provide:

> 27.1 Clerk May Rule on Certain Motions. The Clerk is authorized, in his discretion and subject to review by the Court, to take appropriate action for the Court on the following unopposed procedural motions:
>
> 27.1.1 To enlarge the time for filing designations as to printing under FRAP 30; and for filing briefs, answers, objections, or replies to pending motions, in any cases not yet assigned or under submission;

Fifth Circuit Local Rules 42.3.2, 42.3.3, and 42.3.4 provide:

> 42.3.2 In all other appeals when appellant fails to order the transcript or fails to file a brief or otherwise fails to comply with the rules of the Court, the Clerk shall enter an order dismissing the appeal for want of prosecution.

42.3.3 In all instances of failure to prosecute an appeal to hearing as required, the Court may take such other action as it deems appropriate.

42.3.4 A copy of an order dismissing an appeal for want of prosecution shall be issued to the Clerk of the District Court as the mandate.

STATEMENT OF THE CASE

This case grows out of a Rule 60(b) Motion filed in the district court during the pendency of an appeal from the original judgment. Jurisdiction of the original lawsuit was based on diversity of citizenship (28 U.S.C. § 1332) and on federal questions under the securities laws. 28 U.S.C. § 1331. After the Rule 60(b) Motion was denied, an appeal was perfected. Petitioners sought and obtained consolidation of the appeal from the original judgment with the appeal from denial of the Rule 60(b) Motion. (App. A-13). In conjunction with granting consolidation, the Court of Appeals set a briefing schedule under which Petitioner's brief was due fourteen days after the filing of the record. (*Id.*) Nothing in the briefing schedule stated that extensions could not be obtained under the usual procedures of the Court. (*Id.*)

The record was filed on February 7, 1990 and, as a result, Petitioner's brief was originally due on February 21, 1990. (App. A-10). In the meantime, Petitioners sought leave to supplement the (as yet unfiled) record with additional documents. (*See* A-11).[1] After this motion was denied, Petitioners moved for reconsideration.

1. These were the newly discovered documents which had formed the basis of the Rule 60(b) Motion. The district court had ordered all known copies returned to Respondents. Obivously, the documents were central to the appeal.

(App. A-8). This motion was pending when the Record was filed and was not overruled until February 20, 1990. (App. A-8). On February 12, 1990, Linda Crenshaw, one of Petitioner's counsel before the Court of Appeals, called the Clerk of the Court and was verbally granted an extension in which to file a brief until thirty days after the ruling on the pending motion for reconsideration of supplementation of the record. She sent a letter to the Clerk confirming the extension. (App. A-9).[2]

On February 16, 1990, Respondents filed a Motion to Strike Extension of Time. (See App. A-7). On March 2, 1990, the Court granted the Motion to Strike Extension of Time. (App. A-7).[3] On March 5, 1990, Petitioners filed a Motion to Reconsider this action. (App. A-2-3). On March 26, 1990, Petitioners tendered their brief together with a renewed motion for leave to file it. (App. A-1).[4] Petitioner's motions were denied on March 27, 1990, (App. A-1), and the appeal was dismissed for want of prosecution on March 28, 1990). (App. C-1). A motion for rehearing was denied April 23, 1990. (App. C-2).

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2. The Local Rules of the Fifth Circuit have long permitted the Clerk's office to grant routine procedural motions such as extension of time to file a brief. *See* Local Rule 27.1.1. Although the Rule is limited on its face to "unopposed" motions, the Clerk has a long-standing practice of granting first motions for extension of an *ex parte* basis on a telephone call. *See* Marcaida v. Rascoe, 569 F.2d 828, 830 (5th Cir. 1978).

3. Petitioner's counsel later swore that she had not filed any opposition because she had never received the usual and customary notice from the Clerk's office stating when the motion would be submitted. (*See* App. A-6).

4. The thirtieth day after denial of supplementation of the record was March 22. Notice of this was sent by mail, so three days should be added. March 25 was a Sunday. Thus, the brief was timely under the Clerk's order.

REASONS FOR REVIEW

The Court of Appeals has so departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

A. Summary:

Dismissal of a case without ruling on the merits is a harsh remedy. The Courts of Appeals uniformly require repeated violations or evidence of intentional misconduct before a trial court's action of dismissing for want of prosecution will be upheld. However, at the appellate level the authorities are in disarray. Some Courts of Appeals apply approximately the same test as applied at the trial level and will not usually dismiss for want of prosecution absent repeated or serious misconduct. Other Courts of Appeals apply almost the opposite test. These Courts place the burden on a party who has committed a minor infraction of the rules to show "extraordinary circumstances" or suffer dismissal. Other Courts of Appeals frankly acknowledge that the test is unclear and that the rulings have been uneven and inconsistent. Turning to the present case, if a showing of intentional misconduct or repeated violations was required, the dismissal was totally unjustified. At best, this case shows inattentativeness by Petitioners' counsel *and* by the Clerk of the Court. This Court needs to provide some guidelines.

B. Trial Courts Power to Dismiss for Want of Prosecution:

In *Link v. Wabash Railroad Co.*, 370 U.S. 626, 82 S.Ct. 1386, 8 L.Ed.2d 734 (1962) this Court recognized the inherent "authority of a Federal trial court to dismiss a plaintiff's action with prejudice because of his failure

to prosecute." 370 U.S. at 629. Under the particularly egregious facts of that case, the Court had little difficulty concluding that the dismissal did not amount to an abuse of discretion. 370 U.S. at 633. However, the Court reserved ruling on whether a single violation of the rules "would *alone* justify a dismissal with prejudice." 370 U.S. at 634 (emphasis in original). *See also Roadway Express, Inc. v. Piper,* 447 U.S. 752, 765, 100 S.Ct. 2455, 65 L.Ed.2d 488 (1980).

The lower courts, interpreting *Link,* have uniformly held that dismissal with prejudice by a trial court is a harsh action which should only be upheld where there is evidence of bad faith or repeated violations. *United States Investment and Development Corp. v. Cruz,* 780 F.2d 155, 168 (1st Cir. 1986) (granting dismissal for failure to prosecute is a severe action and should only be employed when necessary to prevent unfair prejudice and undue delays); *Salahuddin v. Harris,* 782 F.2d 1127, 1132 (2nd Cir. 1986) (Deliberate frustration of process is grounds for dismissal of lawsuit); *Durstar v. Triangle Lumber and Supply Co.,* 816 F.2d 1126 (3rd Cir. 1987) (it is error to dismiss for failure to prosecute without finding supported by record that client bore some responsibility for flagrant actions of attorney); *Andes v. Versant Corp.,* 788 F.2d 1033, 1037 (4th Cir. 1986) (Dismissal for want of prosecution requires "clear record of delay or contumacious conduct."); *Ford v. Sharp,* 758 F.2d 1018, 1021 (5th Cir. 1985) (requiring "a clear record of delay or contumacious conduct."); *Patterson v. Township of Grand Blanc,* 760 F.2d 686, 689 (6th Cir. 1985) (requiring a "clear record of delay or contumacious conduct".); *Beeson v. Smith,* 893 F.2d 930, 931 (7th Cir. 1990) (Dismissal for want of prosecution

is a "drastic" remedy requiring a showing of "willfulness"; it is usually more appropriate to sanction the attorney.); *Clayton v. White Hall School Dist.*, 778 F.2d 457 (8th Cir. 1985) (requiring a "pattern of delay" or "contumacious conduct".); *Henderson v. Duncan*, 779 F.2d 1421, 1423 (9th Cir. 1986) ("Dismissal is a harsh penalty and is to be imposed only in extreme circumstances."); *Stanley v. Continental Oil Cos.*, 536 F.2d 14 (10th Cir. 1976) (dismissal for failure to prosecute on grounds of dilatory and unjustifiable conduct); *McKelvey v. AT&T Technologies, Inc.*, 789 F.2d 1518, 1520 (11th Cir. 1986) (The "extreme circumstances necessary to support the sanction of dismissal must, at a minimum, be based on evidence of wilful delay; simple negligence does not warrant dismissal"); *Shea v. Donohoe Construction Co., Inc.*, 795 F.2d 1071 (D.C. Cir. 1986) (Dismissal for want of prosecution normally requires a showing of misconduct by the *plaintiff* himself, and not merely by his attorney). *Cf., Societe Internationale v. Rogers*, 357 U.S. 197, 211, 78 S.Ct. 1087, 2 L.Ed.2d 1255 (1958) (Requiring a wilful violation to dismiss for discovery misconduct).

C. Court of Appeal's Power to Dismiss for Want of Proceution:

At the Court of Appeals level the standard is less clear. This Court has never directly addressed the bounds of the discretion of a Court of Appeals to dismiss for want of prosecution. *But see, Thomas v. Arn*, 474 U.S. 140, 147, 106 S.Ct. 466, 88 L.Ed.2d 435 (1985) (implying in *dicta* that the discretion of a Court of Appeals to dismiss is the same as that of a trial court).

A sampling of the standards applied by various Courts of Appeals in deciding motions to dismiss for want of prosecution reveals nothing less than confusion. With the exception of the present case, the Fifth Circuit requires serious misconduct before dismissing for want of prosecution. It has stated that "the late filing of briefs is at most a non-jurisdictional defect . . . which we consider insufficient to warrant dismissal," *Marcaida v. Rascoe*, 569 F.2d 828, 830 (5th Cir. 1978); *See also Gulf Water Benefaction Co. v. Public Utility Comm'n*, 674 F.2d 462, 466 (5th Cir. 1982) ("The drastic sanction of dismissal should not be imposed for minor infractions of the rules"). The Eleventh Circuit apparently takes a similar approach. *See In Re Beverly Mfg. Co.*, 778 F.2d 666, 667 (11th Cir. 1985) (indicating that dismissal for failure to timely file a brief is improper in the absence of "bad faith, negligence or indifference.").

The District of Columbia Circuit takes exactly the opposite approach. That Court places the burden on the party whose brief was late to show "extraordinary and compelling circumstances" to avoid dismissal. *Barber v. American Secuity Bank*, 841 F.2d 1159, 1162 (D.C. Cir. 1988); *See also, HBZ Communications, Inc. v. FCC*, 825 F.2d 516 (D.C. Cir. 1987); *Community Coalition for Media Change v. FCC*, 646 F.2d 613 (D.C. Cir. 1980). An older case from the Second Circuit takes a similar approach. *Gilroy v. Erie Lackawanna Ry. Co.*, 421 F.2d 1321, 1323 (2d Cir. 1970).

The standard in the Seventh Circuit is puzzling. In *Connecticut General Life Ins. Co. v. Chicago Title and Trust Co.*, 690 F.2d 115 (7th Cir. 1982) *cert. denied*, 464 U.S. 999 (1983), appellant was granted *five* extensions of time in which to file its brief. Nonetheless, it

missed the final deadline and sought leave to file its brief "instanter". The Court denied the motion, but *admitted* that it had "not always been consistent" in ruling on motions for extensions of time and had sometimes granted motions similar to the one before it. 690 F.2d at 116. In *Stotler and Co. v. Able,* 837 F.2d 1425 (7th Cir. 1988) the Court dismissed an appeal when it became apparent that an extension of time had been obtained by outright misrepresentations to the Court. However, even there the Court invited the litigant to move for reinstatement of the appeal if it could show it was not involved in the attorney's misconduct. 837 F.2d at 1427; *See also El-Gharabli v. Immigration and Naturalization Service,* 796 F.2d 935 (7th Cir. 1986) (The Court chose to sanction the attorney for late filing rather than dismiss the appeal).

The standard applied in other circuits is completely unclear. The Ninth Circuit in *Kajioka v. Commissioner,* 883 F.2d 57 (9th Cir. 1989) dismissed for want of prosecution when appellant's attorney twice failed to appear at a pre-briefing conference. However, the Court did not articulate whether bad faith was required and did not indicate whether it considered itself to have authority to dismiss for a lesser violation. A more recent Second Circuit opinion concedes that the standard has not been "sufficiently articulated". *United States v. Raimondi,* 760 F.2d 460, 463 (2d Cir. 1985).

D. Analysis:

If dismissal of an appeal for want of prosecution requires repeated or wilful misconduct, this record reveals gross abuse of discretion. Petitioners' counsel was quite inexperienced. She sought a *first* extension of time to file

her brief in exactly the manner permitted under the local rules and customs of the Court. The Clerk, in fact, granted (or purported to grant) the extension. Nothing in the scheduling order made it clear that the customary means of obtaining an extension were unavailable. There is no evidence of any misconduct by the clients themselves or of any prejudice to Respondents. At most, this record shows excusable neglect by both Petitioners' counsel *and* the Clerk. The action of the Court of Appeals in retroactively overruling the Clerk *after* the deadline in which to file the brief had passed was no less than outrageous. That action can only be justified if the Court of Appeals has almost absolute power to dismiss for want of prosecution based on even minor infractions of the rules.

PRAYER FOR RELIEF

Petitioners urge the Court to grant a writ of certiorari and reverse and remand to the Court of Appeals for a decision on the merits.

Respectfully submitted,

ESSMYER & HANBY

By: _____

CLINARD J. HANBY

4300 Scotland
Houston, Texas 77007
(713) 869-1155

Attorney for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the foregoing Petition for Writ of Certiorari has been delivered by hand delivery or by depositing in the U.S. Mail, certified mail, return receipt requested, to DAVID RUSSELL, Parker, Hudson, Rainer & Dobbs, 1200 Carnegie Building, 133 Carnegie Way, Atlanta, Georgia 30303, on this the _____ day of July, 1990.

CLINARD J. HANBY

APPENDIX A

Opinions, Orders and other pertinent proceedings of the United States Court of Appeals for the Fifth Circuit.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-6140

J. B. HARALSON, ET AL.,
Plaintiffs-Appellants,

versus

THE E. F. HUTTON GROUP, INC., ET AL.,
Defendants-Appellees.

* * * * *

THE E. F. HUTTON GROUP, INC., ET AL.,
Plaintiffs-Appellees,

versus

GEORGE J. AUBIN, ET AL.,
Defendants-Appellants

Appeals from the United States District Court for the
Southern District of Texas

(Filed March 27, 1990)

O R D E R :

IT IS ORDERED that the motion of appellants, the Aubin and Haralson parties, for leave to file brief out of time is DENIED.

/s/ JERRY E. SMITH
Judge Jerry E. Smith
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-6140

J.B. HARALSON, et al.,
Plaintiffs-Appellants,

versus

THE E.F. HUTTON GROUP, INC., et al.,
Defendants-Appellees.

* * * * *

THE E.F. HUTTON GROUP, INC., et al.,
Plaintiffs-Appellees,

versus

GEORGE J. AUBIN, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Texas

(Filed March 27, 1990)

Before WILLIAMS, HIGGINBOTHAM, and SMITH, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of appellants for reconsideration of the court's order entered on March 3, 1990, striking their motion for continuance within which

to file their brief is denied, for the reasons hereinafter explained.

On December 6, 1989, the appellants moved to consolidate the appeals in Nos. 88-2999 and 89-6140, asserting that "the facts are the same and the legal issues presented in the two cases are inextricably intertwined" and that "[t]he consolidation of the two appeals would result in the orderly administration of justice by eliminating duplication of efforts . . . ." The appellees opposed the motion, asserting that it was part of appellants' strategy of delay. The appellees noted that the appellants had failed to file their reply brief in No. 88-2999 by the extended deadline granted by the clerk and claimed that appellants planned to utilize the consolidation as a vehicle for filing briefs in No. 89-6140 on issues that would have been addressed in the unfiled reply brief in No. 88-2999. The appellees further argued that the motion for consolidation "marks their sixth attempt to delay resolution of appeal No. 88-2999," noting that "Aubin and Haralson have previously sought four extensions in addition to filing a motion to stay the entire appeal."

On Deceimber 20, 1989, we granted the motion to consolidate but, to avoid some of the delay in the resolution of No. 88-2999 occasioned by the consolidation, directed an abbreviated briefing schedule in No. 89-6140. The shortened schedule was appropriate in that, as appellants had asserted, the facts and issues were closely related. Hence, as the briefing in No. 88-2999 had been completed, the briefs in No. 89-6140 could be completed in a shorter period of time. Significantly, no party requested reconsideration or revision of the order granting consolidation and setting the briefing schedule.

On January 3, 1990, the appellants filed a motion to supplement the record on appeal in No. 89-6140. On January 22 the Court denied that motion as being entirely without merit. On February 1, the appellants moved for reconsideration of that order, and on February 20 we denied that motion.

On February 12, appellants' counsel called the clerk's office to request an extension of time for filing appellants' opening brief in No. 89-6140. Under the court's order of December 20, that brief was due February 20; despite that order, the clerk's office mistakenly granted appellants an extension until 30 days after the court's ruling on the motion to supplement the record.

On February 15, the appellees moved the court to strike the clerk's extension as in contravention of the order of December 20. After receiving that motion, the clerk's office on February 15 sent to *all counsel* the usual form letter calling counsel's attention to the filing of the motion to strike and noting, "This motion will be presented for ruling *without oral argument* on this date: FEBRUARY 22, 1990[.] Any response to the motion must be filed by opposing counsel on or before that date to be considered in the ruling."

No response or opposition, either timely or untimely, was ever received from the appellants. Hence, as the extension patently (albeit accidentally) had undermined the court's briefing schedule, and as the motion to strike was unopposed, a judge of this court granted it on March 2.

The appellants now seek reconsideration of that order (the third reconsideration that they have sought in recent weeks). Concluding that appellants have waived their rights under the rules of this court and have attempted to

contravene our overt efforts to expedite this appeal to ameliorate the effects of the consolidation that *appellants* had requested, we deny reconsideration.

As noted above, the appellants never sought direct reconsideration or amendment of the order of December 20 setting a firm briefing schedule. That order directs them to file an opening brief within 14 days of receipt of the record in No. 89-6140. On January 3, when appellants moved that that record be supplemented, they did not indicate any need to await the courts' ruling on that motion before filing their brief.

No request for extension of briefing time was made until the call to the clerk on February 12. By that time, fully 21 days had elapsed since the motion to supplement the record had been denied, and only the motion for reconsideration was pending. Nevertheless, the reason advanced for the extension was that appellants' counsel "was unsure as to what the record would consist of to complete the appellate brief."

Appellants' motion to supplement the record was meritless. Nevertheless, by their motion for extension appellants in effect attempted to bootstrap themselves into a circumvention of the court's briefing schedule by means of the unwarranted motion to supplement, which had already been denied. Hence, if the motion for extension had been presented directly to this court, it undoubtedly would have been denied.

Moreover, the appellants slept on their rights once the appellees requested that we strike the unjustified continuance. Despite their acknowledged receipt of a copy of the motion, the appellants entered no objection or response thereto.

Now, in their request for reconsideration of the March 2 order, appellants' counsel claims that he "did not receive any communication from the Court that such motion would be ruled upon by the Court." We infer that counsel is asserting that he did not receive a copy of the clerk's form submission letter, although the clerk mailed him a copy and his name appears among the recipients. Remarkably, counsel asserts that he assumed that the motion would not be submitted to, and ruled upon by, the court. This position taken by appellants' counsel is vapid, as a simple telephone call to the clerk's office would have indicated.[1]

In summary, the appellants in No. 89-6140 fervently requested consolidation and tacitly accepted an expedited briefing schedule as a condition thereof. They cannot employ a useless motion to supplement the record as a device for undermining the briefing schedule. Nor can they allow a motion to go unopposed, then seek reconsideration by claiming ignorance of this court's customary procedures. The motion for reconsideration accordingly is DENIED.

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1. Counsel's position on this matter patently overlooks the rules of this court. He claims that he assumed that the *clerk's* order overruled the *court's* order of December 20. However, Fifth Cir. Loc. R. 27.1 provides that the clerk can grant extensions "subject to review by the Court." Hence, counsel's claim that he thought that appellees' motion would not be submitted to the court is, at best, difficult to accept, as appellees were merely asking the court, pursuant to rule 27.1, to review the clerk's decision.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-6140

J.B. HARALSON, ET AL.,
Plaintiffs-Appellants,

versus

THE E.F. HUTTON GROUP, INC., ET AL.,
Defendants-Appellees.

* * * * *

THE E.F. HUTTON GROUP, INC., ET AL.,
Plaintiffs-Appellees,

versus

GEORGE J. AUBIN, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

(Filed March 2, 1990)

(Received March 6, 1990)

O R D E R :

IT IS ORDERED that the unopposed motion of appellees to strike the extension of time granted to appellants for filing their opening brief in this case is GRANTED.

/s/ JERRY E. SMITH
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2999

J. B. HARALSON, ET AL.,
Plaintiffs-Appellees-Cross-Appellants,

versus

THE E. F. HUTTON GROUP, INC., ET AL.,
Defendants-Appellants-Cross-Appellees.

* * * * *

THE E. F. HUTTON GROUP, INC., ET AL.,
Plaintiffs-Appellants-Cross-Appellees,

versus

GEORGE J. AUBIN, ET AL.,
Defendants-Appellees-Cross-Appellants.

Appeals from the United States District Court for the
Southern District of Texas

(Filed February 20, 1990)
(Received February 22, 1990)

Before WILLIAMS, HIGGINBOTHAM and SMITH, Circuit Judges.

BY THE COURT:

A member of this panel has heretofore denied the motion of the Haralson parties to supplement the record on appeal. Upon reconsideration by this panel, IT IS ORDERED that the motion of the Haralson appellees for leave to supplement the record on appeal is DENIED.

CADDELL & CONWELL
Attorneys at Law
The Park in Houston Center
1331 Lamar, Suite 1070
Houston, Texas 77010-3027

February 12, 1990

Ms. Rosalie C. Varino
Case Manager
U. S. Court of Appeals
For the Fifth District
600 Camp Street
New Orleans, Louisiana 70130

Re: Appeal No. 88-2999; *J. B. Haralson, et al v. The E. F. Hutton Group, Inc., et al;* In the United States Court of Appeals for the Fifth Circuit

Dear Ms. Varino:

This will confirm our telephone conference on February 12, 1990, where the Aubin and Haralson Parties have up to and including 30 days from the Panel's ruling on their Motion to Supplement the Record to file their brief. Your consideration in this matter was appreciated.

Sincerely,

/s/ LINDA L. CRENSHAW
Linda L. Crenshaw

LLC:cjc
29LLC/A06818.L1
cc: *CERTIFIED MAIL RRR*
NO. P 683 304 743
Mr. David G. Russell
Parker, Hudson, Rainer & Dobbs
1200 Carnegie Building
133 Carnegie Way
Atlanta, GA 30303

UNITED STATES COURT OF APPEALS
Fifth Circuit
Office of the Clerk

February 7, 1990

Mr. Michael A. Caddell
Attorney at Law
1331 Lamar, Ste. 1070
Houston, TX 77010

No. 89-6140 J.B. Haralson, Et Al. v.
The E.F. Hutton Group, Inc., Et Al.

Dear Counsel:

This is to advise that the 74 volume record on appeal and 14 boxes of exhibits has this date been filed in the referenced case.

Therefore, in accordance with this Court's order of December 20, 1989, appellant's brief will be due for filing within 14 days from this date, or, by not later than February 21, 1990. Apppellees' brief will be due 14 days from receipt of appellants' briefs.

Should you have any questions concerning the above, please feel free to contact this office.

Sincerely yours,

GILBERT F. GANUCHEAU,
Clerk

By /s/ ROSALIE C. VARINO
Case Manager

RCV:1mc
cc: Mr. David G. Russell

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2999

J. B. HARALSON, ET AL.,
Plaintiffs-Appellees-Cross-Appellants,

versus

THE E. F. HUTTON GROUP, INC., ET AL.,
Defendants-Appellants-Cross-Appellees.

* * * * *

THE E. F. HUTTON GROUP, INC., ET AL.,
Plaintiffs-Appellants-Cross-Appellees,

versus

GEORGE J. AUBIN, ET AL.,
Defendants-Appellees-Cross-Appellants.

Appeals from the United States District Court for the
Southern District of Texas

(Filed January 22, 1990)

O R D E R :

IT IS ORDERED that the motion of the Haralson partie to supplement the record on appeal is DENIED.

/s/ J. E. SMITH 1-19-90
United States Circuit Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 88-2999

J. B. HARALSON, ET AL.,
Plaintiffs-Appellees Cross-Appellants,

versus

THE E. F. HUTTON GROUP, INC., ET AL.,
Defendants-Appellants Cross Appellees.

* * * * *

THE E. F. HUTTON GROUP, INC., ET AL.,
Plaintiffs-Appellants Cross-Appellees,

versus

GEORGE J. AUBIN, ET AL.,
Defendants-Appellees Cross-Appellants.

No. 89-6140

J. B. HARALSON, ET AL.,
Plaintiffs-Appellants,

versus

THE E. F. HUTTON GROUP, INC., ET AL.,
Defendants-Appellees.

* * * * *

THE E. F. HUTTON GROUP, INC., ET AL.,
Plaintiffs-Appellees,

versus

GEORGE J. AUBIN, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Texas

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(Filed December 20, 1989)

(Received December 27, 1989)

O R D E R :

IT IS ORDERED that the motion of appellant to consolidate the appeals is GRANTED. The briefing schedule for the appeal in No. 89-6140 shall be expedited as follows: The brief of appellants shall be received in the clerk's office no later than 14 days after the date on which the record is filed. The brief of appellees shall be received in the clerk's office no later than 14 days following actual receipt by appellees of appellants' brief. The reply brief, if any, of appellants shall be received in the clerk's office no later than 7 days following actual receipt by appellants of appellees' brief. Also in No. 89-6140, the principal briefs of the parties shall not exceed 25 pages in length, and appellants' reply brief, if any, shall not exceed twelve pages in length. Briefs shall be consolidated as in No. 88-2999.

IT IS FURTHER ORDERED that the motion of Grant for leave to file a reply to appellants' reply brief is DENIED.

IT IS FURTHER ORDERED that the motion of appellant to strike portions of appellee Grant's brief is GRANTED.

/s/ J. E. SMITH
Jerry E. Smith
U. S. Circuit Judge

APPENDIX B

Order of the United States District Court for the Southern District of Texas.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS.
HOUSTON DIVISION

CIVIL ACTION NO. H-86-2761

J. B. HARALSON, et al.,
Plaintiffs,

vs.

THE E. F. HUTTON GROUP, INC., et al.,
Defendants.

(Filed September 21, 1989)

ORDER DENYING A NEW TRIAL
AND RECONSIDERATION

The plaintiffs' motions for a new trial and for reconsideration are denied.

Signed on September 20th, 1989, at Houston, Texas.

/s/ LYNN N. HUGHES
Lynn N. Hughes
United States District Judge

APPENDIX C

Judgment of the Court of Appeals and order denying rehearing.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-6140

J.B. HARALSON, ET AL.,
Plaintiffs-Appellants,

versus

THE E.F. HUTTON GROUP, INC., ET AL.,
Defendants-Appellees.

* * * * *

THE E.F. HUTTON GROUP, INC., ET AL.,
Plaintiffs-Appellees,

versus

GEORGE J. AUBIN, ET AL.,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Texas

CLERK'S OFFICE:

Pursuant to Local Rule 42.3, the appeal was duly entered dismissed for want of prosecution for failure of appellants to file their brief within the time fixed by the rules, this 28th day of March, 1990.

GILBERT F. GANUCHEAU
Clerk of the United States Court
of Appeals for the Fifth Circuit

By: /s/ HOLLY M. EWENS
Deputy Clerk
FOR THE COURT —
BY DIRECTION

C-2

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 89-6140

J.B. HARALSON, ET AL.,
Plaintiffs-Appellants,

versus

THE E.F. HUTTON GROUP, INC., ET AL.,
Defendants-Appellees.

* * * * *

THE E.F. HUTTON GROUP, INC., ET AL.,
Plaintiffs-Appellees,

versus

GEORGE J. AUBIN, ET AL.,
Defendants-Appellants.

Appeal from the United States District Court for the
Southern District of Texas

(Filed April 23, 1990)

(Received April 25, 1990)

ON PEITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion _____, 5 Cir., 198__, ____F.2d____)

Before WILLAMS, HIGGINBOTHAM and SMITH, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ J. E. SMITH
United States Circuit Judge